IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR

FRIDAY, THE 30TH NOVEMBER 2007 / 9TH AGRAHAYANA 1929

WP(C).No. 17765 of 2005(M)

PETITIONER:

K.R. SOMASUNDARESWARAN, RESIDING AT
KAMALA NIVAS, RESIDING AT KAMALA NIVAS,
35/475, MAIN ROAD, OLAVAKKODE,
PALAKKAD-678 002.

BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.)
SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR

RESPONDENTS:

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1. THE STATE OF KERALA REPRESENED BY
THE SECRETARY, LOCAL SELF GOVERNMENT (M)
DEPARTMENT, THIRUVANANTHAPURAM.

2. THE CHIEF TOWN PLANNER, GOVERNMENT OF
KERALA, PALAKKAD.

3. THE PALAKKAD MUNICIPALITY,
REPRESENTED BY ITS CHAIRMAN, PALAKKAD.

4. THE SECRETARY, PALAKKAD MUNICIPALITY,
PALAKKAD.

5. M.L. NAZAR, KAVITHA AUTOMOBILES
CANARA STREET, PALAKKAD.

6. M.L. SALEEM, NEW KAVITHA AUTOMOBILES
COIMBATORE ROAD, PALAKKAD.

R2 TO 3 BY ADV. SRI.V.CHITAMBARESH
R1 TO 3 BY GOVERNMENT PLEADER SMT. SUDHA DEVI
R5 & 6 BY ADV. SHRI. SIRAJ KALADY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 30/11/07, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN W.P(C) 17765/05

PETITIONER'S EXTS:

EXT.P1: TRUE COPY OF AN AGREEMENT DT. 15.6.89

EXT.P2: -DO- OF THE ASSIGNMENT DEED

EXT.P3: -DO- OF A RESOLUTION DT. 26.9.96

EXT.P4: -DO- OF THE BUILDING PERMIT DT. 24.1.2000

EXT.P5: -DO- OF AN ORDER DIRECTING THE RESPONDENTS 5 AND 6 TO DEMOLISH THE CONSTRUCTION DT. 20.4.02

EXT.P6: -DO- OF AN ORDER DT. 29.7.2002 PROHIBITING THE RESPONDENTS 5 AND 6 FROM CONSTRUCTING

EXT.P7: -DO- OF AN ORDER DT. 2.5.03 PASSED BY THE 4TH RESPONDENT DIRECTING ALL THE PARTIES TO THE AGREEMENT TO SURRENDER THEIR RESPECTIVE LANDS

EXT.P8: -DO- OF AN ORDER DT. 23.1.2004 BY THE 1ST RESPONDENT GOVERNMENT REGULARISING THE ILLEGAL CONSTRUCTIONS MADE BY THE RESPONDENTS 5 AND 6.

EXT.P9: -DO- OF THE JUDGMENT DT. 1.7.04 IN W.P(C) 9432/04

EXT.P10: -DO- OF THE PETITIONER'S OBJECTIONS SUBMITTED BEFORE THE GOVERNMENT DT.

EXT.P11: -DO- OF AN ORDER DT. 14.2.05 PASSED BY THE GOVERNMENT

EXT.P12: -DO- OF THE APPLICATION FOR REVIEW DT.

EXT.P13: -DO- OF THE PETITIONER'S OBJECTIONS TO EXT.P12 REVIEW DT.

EXT.P14: -DO- OF THE ORDER PASSED BY SRI. P. KAMAL KUTTY, SECRETARY TO THE GOVERNMENT DT. 31.5.05

RESPONDENTS' EXTS:

EXT.R5A -DO- OF THE SALE DEED DT. 8.12.1989 BEARING NO: 3679 OF SRO, PALAKKAD

EXT.R5B: -DO- OF THE SALE DEED DT. 8.12.1989 BEARING NO: 3680 OF SRO, PALAKKAD

EXT.R5C: -DO- OF LAND TAX RECEIPT DT. 9.3.2004 ISSUED BY THE VILLAGE OFFICER, PALAKKAD IIII VILLAGE

EXT.R5D: -DO- OF AFFIDAVIT DT. 25.7.2002 BEFORE THE SECRETARY, MUNICIPALITY BY SMT. JOHARA

EXT.R5E: -DO- OF THE COMPLAINT DT. 1.4.2004 FILED BY SMT. JOHARA FILED BEFORE THE SUB INSPECTOR, SOUTH POLICE STATION, PALAKKAD

EXT.R5F: -DO- OF FIR NO: 94 DT. 2.4.20004 REGISTERED BEFORE THE CHIEF JUDICIAL MAGISTRATES COURT, PALAKKAD

EXT.R5G: -DO- OF LEGAL NOTICE DT. 12.7.2004 ISSUED BY THE PETITIONER TO SMT. JOHARA

EXT.R5H: -DO- OF REPLY NOTICE DT. 20.7.2004 ISSUED BY SMT. JOHARA TO THE PETITIONER

EXT.R5I: -DO- OF COUNTER AFFIDAVIT DT. 28.7.2002 IN O.P.15571/2002 FILED BY THE 6TH RESPONDENT

EXT.R5J: DO- OF COUNTER AFFIDAVIT DT. 31.7.2002 IN O.P.NO: 15571/02 FILED BY THE SECRETARY, PALAKKAD MUNICIPALITY

EXT.R5K: -DO- OF JUDGMENT DT. 28.9.2004 IN C.C.C.642/2003 OF THIS HONOURABLE COURT.

EXT.R5L: -DO- OF REPORT SUBMITTED BY THE ASST. DIRECTOR (DOCUMENTS) FORENSIC SCIENCE LABORATORY, THIRUVANANTHAPURAM

jj /TRUE COPY/

P.S. TO JUDGE

K.BALAKRISHNAN NAIR, J.

W.P.(C) NO. 17765 OF 2005-M

JUDGMENT

The petitioner challenges Ext.P14 order of the Government dated 31.5.2005. By the said order, Ext.P11 order dated 14.2.2005 passed by it has been recalled and modified.

2. The brief facts of the case are the following: The 3rd respondent Palakkad Municipality framed a scheme under the Madras Town Planning Act, 1920 called "Stadium Complex Scheme". It was a scheme for residential purposes. After completing the statutory formalities, the Government finally notified the scheme in the gazette dated 8.10.1987. 29 persons, who were owners of the land covered by the scheme entered into an agreement with the Palakkad Development Authority to pool their land as contemplated under Section 5 of the Madras Town Planning Act. Ext.P1 is the agreement signed by the 29 land owners. The petitioner is serial number 14 in Ext.P1. The predecessor-in-interest of respondents 5 and 6 is serial number 23 in that agreement. Pursuant to the said agreement, the Palakkad Development Authority prepared and submitted a lay out plan to the Chief Town Planner. He approved the plan and forwarded the same to

the Government. The Government by order dated 12.3.1990 approved the said lay out plan without any modifications. As per the scheme, some of the land owners were to surrender portions of their land to their neighbours and in turn the persons who surrender the land will get corresponding or more extent of land from some other owners. Land was also to be surrendered for common facilities like park, road etc. In terms of the scheme the petitioner surrendered 2.13 cents of land to a neighbouring land owner Mr.Viswanathan, who is Sl.No.16 in Ext.P1. Smt.Johra, Sl.No.23 was to surrender 1.75 cents of land to Smt.Alamelu, the petitioner's wife and 2.75 cents of land to the petitioner. Smt.Johra assigned the land owned by her to respondents 5 and 6, after executing Ext.P1 agreement. The petitioner submits, a meeting of the land owners was held by the Palakkad Development Authority on 26.9.1996, in which the 5th respondent was also represented and a resolution was passed to complete the mutual exchange of land as per the approved lay out as expeditiously as possible. Ext.P3 is the minutes of the said meeting.

3. While so, the respondents 5 and 6 obtained Ext.P4 building permit from the Secretary of the Municipality on 24.1.2000 for the construction of a two storeyed building consisting of the ground floor and first floor. They started construction of the building. As they were doing the same without

surrendering the land in terms of Ext.P1, the petitioner complained before the Municipality, pointing out the illegality being committed by them. So, the Municipality issued Ext.P5 stop memo, directing to stop the construction, as the same is in violation of Ext.P1 agreement. The petitioner also approached this Court, by filing O.P.No.15571/2002, seeking appropriate orders to enforce Ext.P5, as he felt that the Municipality was not taking any effective steps after issuing Ext.P5. While so, the Municipality issued Ext.P7 order dated 2.5.2003, directing the land owners to mutually exchange the lands which are liable to be exchanged as per the approved lay out.

4. The respondents 5 and 6, while so, moved the Government and obtained Ext.P8 order dated 23.1.2004. As per the said order, the Municipality was directed to regularise the construction of the building undertaken by them under Rule 143 of the Kerala Municipality Building Rules. The petitioner challenged the said order before this Court and this Court by Ext.P9 judgment, quashed the said order and directed the Government to take a fresh decision in the matter in accordance with law within three months.

5. The Government thereafter heard the petitioner and respondents 5 and 6 and passed Ext.P11 order dated 14.2.2005, holding that the

unauthorised construction carried out by respondents 5 and 6 cannot be regularised, as the same violates the provisions of Kerala Municipality Building Rules, 1999 and the scheme provisions. The Municipal Secretary was directed to proceed against the unauthorised construction as per the Rules and also to proceed to implement the Government approved detailed town planning scheme. The relevant portion of the said order reads as follows:

> "The Town Planner, Palakkad has reported that Shri.M.L.Nazar and M.L.Salim were given permission for the construction of two storeyed building, but they have constructed four storeyed apartment buildings and single storeyed building in violation of KMBR 1999 and in violation of the approved plan. The four storeyed building constructed violates the following rules:
>
> (1) 17(1) Permission was not obtained when constructing the building differently from the approved plan.
>
> (2) 25(1) the difference between the building and road boundary
> Required -3M Provided 1.20M (1.80 projection of Verandah)
>
> (3) 24(3) Front open space
> Required – 3.50M Provided 1.20M (1.80 project of Verandah)
>
> (4) 24(4) Back open space
> Required – 2.50M Provided – 1.50M
>
> (5) 24(5) Side open space 1.70M (Southern side)
> Required – 1.70M Provided – Nil (Southern side)
>
> The Secretary, Palakkad Municipality has reported that building permit was obtained by the respondents by suppressing

facts regarding the agreement and town planning scheme. On verification of records, it is seen that the Secretary, Palakkad Municipality, has granted permit for the construction of Ground floor+First floor building vide building permit No.EJBR/1105/99-00/PW4 dated 24.01.2000. Though the Secretary has issued notice to the respondents vide notice No.PW4/30313/2001 dated 07.08.2001 for verifying the permit and plan, no action seems to be taken to stop the work or for revoking the building permit already issued. Sri.Somasundereswaran filed complaint against the construction before the Secretary on 28.01.2002. The Secretary, Palakkad Municipality has issued provisional order vide notice No.EJBR/1105/99-00/PW4 on 27.7.2002. By this time the construction might have progressed to considerable extent. The Secretary, Palakkad Municipality has not applied his mind while issuing building permit and he had not verified for the existence of Town Planning Scheme. Therefore it seems that there is some lapse on the part of the Secretary, Palakkad Municipality, in this cases.

The Senior Town Planner (Vigilance) was requested to offer his remarks in the matter. He has stated that the construction violates provisions of KMBR 1999 and scheme provisions.

The Unauthorised construction carried out by Sri.M.L.Nazar and Sri.M.L.Salim in Sy.No.3617, 3154 (Ward 5, Block-63 of Palakkad Municipality cannot be regularised since the construction violates provisions of KMBR 1999 and scheme provisions. The Secretary, Palakkad Municipality is directed to proceed against the unauthorised construction, as per rules and may proceed with the implementation of Government approved Detailed Town Planning Scheme."

6. Later, the respondents 5 and 6 filed Ext.P12 review application before the Government, praying to recall Ext.P11 and also to permit them to continue the construction. The petitioner filed Ext.P13 objection. After

hearing both sides, Ext.P14 order was passed by the Government on 31.5.2005. The contention of the petitioner that the Government have no jurisdiction to entertain Ext.P12 was overruled by the Government, relying on Rule 7 of the Kerala Building (Regularisation of Unauthorised Construction and Land Development) Rules, 1999. It was found that the present owner of the property is not a party to the agreement in respect of the land constitution. Therefore, he is not bound by the condition in the agreement. It was also found that the building is not constructed in violation of Section 18 of the Madras Town Planning Act and therefore, there is no scheme violation. So, the Municipal Secretary was directed to permit the construction, if it does not violate the provisions contained in the Kerala Municipality Building Rules, 1999.

7. The petitioner submits, the construction made by the respondents 5 and 6 is in violation of Section 19 of the Madras Town Planning Act. The Rules relied on by the Government, namely, Kerala Building (Regularisation of Unauthorised Construction and Land Development) Rules, 1999 are applicable only to unauthorised constructions made before 15.10.1999. Admittedly, in this case, Ext.P4 permit was obtained only on 24.1.2000. Further, even assuming it was a construction to which the above said Rules were applicable, the same made in violation of a Town

Planning Scheme could not be regularised under the said Rules, in view of Rule 5(7) of the said Rules. So, the petitioner prays for quashing Ext.P14 and to restore Ext.P11. He also seeks consequential reliefs.

8. The Government and the Municipality have filed separate counter affidavits. The respondents 5 and 6 have filed a detailed counter affidavit, resisting the prayers in the writ petition.

9. Heard the learned counsel on both sides. Mr.M.Krishna Kumar, appearing for the petitioner reiterated the aforementioned contentions of the petitioner. The learned Government Pleader Smt.N.Sudha Devi and learned senior counsel Mr.Chithambaresh, appearing for the Municipality made available the files of the Government and the Municipality concerning the matter for the perusal of the Court. The learned senior counsel Sri.M.C.Sen appeared for respondents 5 and 6. According to him, the vendor of the said respondents has not signed Ext.P1 agreement. In support of that submission, the learned senior counsel relied on Ext.R5(l) expert opinion produced along with I.A.No.6848/2007. He also submitted that even assuming respondents 5 and 6 have violated Ext.P1 agreement, the said violation can be remedied only by a suit for specific performance.

10. The scheme in question is a scheme notified under the Madras Town Planning Act. Once the scheme comes into force, no permit can be

granted in violation of the terms of the scheme. Under Section 19 of the said Act, the Municipality is authorised to enforce the provisions of the scheme. The Municipality has failed to explain how Ext.P4 permit happened to be issued in January,2000, when the notified Town Planning Scheme and the approved lay out of the scheme were very much in force. Ignoring them, the permit was granted. The files of the Municipality would show that the construction has been made even in violation of the permit granted. Those violations are enumerated in Ext.P11 order, the relevant portion of which is already quoted above. Though, the respondents 5 and 6 would deny the allegation of violation of the permit conditions and violation of the Building Rules in the construction, the same can only be taken as a self serving statement. I find no reason to disbelieve the version of the Municipality, which is noticed in Ext.P11. The violations were found by the Senior Town Planner (Vigilance) also.

11. Further, the Rules relied on by the Government in Ext.P14, that is, the Kerala Building (Regularisation of Unauthorised Construction and Land Development) Rules, 1999 are not applicable to the case on hand, as admittedly, the construction took place only in 2000 or thereafter. The said Rules are meant to take care of the constructions made in violation of the Building Rules prior to 15.10.1999. This is evident from the opening part of

the definition of "unauthorised construction" in Section 2(d), which reads as follows:

> "(d) 'unauthorised construction' means any construction or reconstruction carried out and completed before 15th day of October, 1999."

After 1999 there is no provision in the Kerala Municipality Act also, enabling grant of exemption from the provisions of the Building Rules. The Legislature amended Section 407 of the Municipality Act by Act 14/1999 with effect from 24.3.1999, deleting the provision which enabled the Government to grant exemption.

12. Further, going by Rule 5(7) of the Kerala Building (Regularisation of Unauthorised Construction and Land Development) Rules, 1999, if the construction violates any of the provisions of a Town Planning Scheme, the same cannot be regularised, even in a case where the construction is made before 15.10.1999. The said sub-rule reads as follows:

> "(7) No unauthorised construction shall be regularised if the construction so carried out affects adversely the proposals of any sanctioned General Town Planning Scheme (Master Plan) or Detailed Town Planning Scheme for the area or if the construction grossly violates any safety provisions in the building rules for the time being in force or any safety condition specified in the exemption order or permit."

13. The respondents 5 and 6 have got a case that their predecessor-in-interest did not sign Ext.P1 agreement. But, I find that the said

contention was raised for the first time in Ext.R5(i) dated 28.7.2002, which is the counter affidavit filed by them in O.P.No.15571/2002. But, Ext.R5(l) expert opinion fails to say specifically whether the signature is genuine or forged. The relevant portion of the said report reads as follows:

> "It has not been possible to arrive at any conclusion regarding the authorship of the red enclosed questioned signatures stamped and marked Q1 and Q2 in comparison with the red enclosed standard signatures similarly stamped and marked S11 and S15 or S16 to S21."

Since the matter is stated to be pending investigation, I do not propose to make any comment on it. From the materials on record, the construction is made evidently in violation of the scheme and the Building Rules. The Government have no power or authority to pass an order in the nature of Ext.P14. The Rules relied on do not authorise the Government to pass Ext.P14. So, it is plainly ultra vires and unauthorised.

14. In the result, Ext.P14 is quashed and Ext.P11 is restored. The respondents 5 and 6 are given one month's time to comply with the conditions in Ext.P1 and also to make their constructions in accordance with the Building Rules and the Scheme. If the same is not done within the said time limit, the respondents 3 and 4 shall demolish the building within two weeks thereafter and recover the cost incurred for the same from respondents 5 and 6. The Writ Petition is allowed as above with costs,

which is fixed as Rs.10,000/-. The same shall be paid by respondents 5 and 6 to the writ petitioner.

30th November, 2007. **K.BALAKRISHNAN NAIR, JUDGE.**

Nm/